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No. 1248

In the Supreme Court of the United States

OCTOBER TERM, 1967

HESMER FOODS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (App. 2)[1] enforcing the order of the National Labor Relations Board is not officially reported. The Board's decision and order (App. 5-6) are reported at 161 NLRB No. 45.

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[1] "App." refers to the Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, which petitioner has filed in this Court.

JURISDICTION

The order of the court of appeals was entered on November 17, 1967, and a decree was entered on December 20, 1967 (App. 2-4). On March 19, 1968, Mr. Justice Marshall extended the time for filing a petition for certiorari to and including March 29, 1968. The petition was filed on March 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer, in violation of the National Labor Relations Act, discharged five employees because of their union activity.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq*) are set forth at pp. 4-8 of the petition.

STATEMENT

Petitioner is a meat-packing company located in Evansville, Indiana. During October 1965, 22 employees worked at its Barbecue Division plant—3 or 4 on the night-shift, and the remainder on the day-shift. (App. 8; J.A. 48.) That plant also served as the Company's headquarters, so that Company President Edward Mitchell spent a lot of time there observing the work of the employees (J.A. 80).[2]

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[2] "J.A." refers to the joint appendix to the briefs in the court below.

Early in October 1965, James Bunker, a new night-shift employee, obtained authorization cards from the Union,[3] and proceeded to obtain the signatures of 6 other employees—including Charles Cowan, another night-shift employee, and day-shift employees Robert Bruning, Max Galloway, and Robert Sumrall (App. 9; J.A. 37-38, 45-46). During working hours and on Company premises, these 5 employees distributed union cards to other employees and solicited at least 12 of the plant's 22 employees to join the Union (App. 9; J.A. 53, 60, 67, 70).

On the evening of October 11, Cowan and President Mitchell had a conversation about the Company's intention to hire Negro employees for the first time. Cowan told Mitchell that some employees, including himself and Bunker, objected to Negroes working in the plant. (App. 9-10; J.A. 82-84.) The next night, Cowan and the other card signers attended a meeting at the home of a Union representative (App. 9; J.A. 38, 53).

About 4:00 p.m. the following day (October 13), as Bruning, Galloway, and Sumrall were about to punch out for the day, they found their time cards missing. Foreman Johann summoned them to his desk and told them that they were discharged because of unsatisfactory work (App. 11; J.A. 60-61, 67).

After listening to Johann's explanation, Galloway returned to the production area and told Bunker what had happened. With Galloway, Bunker returned to Johann's desk and asked if he could use the phone.

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[3] Local 388, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO.

Johann said yes, but, as Bunker was dialing, asked whom he was calling. When Bunker answered "The Union," an argument ensued in which both men became angry. (App. 12; J.A. 38-39, 54-55, 61.) However, at no time did Bunker threaten or menace Johann (App. 12, 22-23; J.A. 54-55, 67-68).

Bunker returned to work, and Johann went to Mitchell's office, where he reported that Bunker, using abusive language and gestures, had accused him (Johann) of discharging Sumrall, Galloway, and Bruning for engaging in union activity (App. 12; J.A. 85). Mitchell thereupon discharged Bunker, stating that he had been insubordinate and was an "agitator" (App. 12-13; J.A. 39, 72, 86, 98-99). Mitchell also accused Bunker of race prejudice, a charge which Bunker denied (App. 13; J.A. 86).

Bunker turned to Cowan, who was standing nearby, and asked whether he had heard Mitchell use the word "agitator," and Cowan replied that he had. Mitchell asked, "what have you got to do with this," to which Cowan replied, "I wasn't talking to you." Mitchell responded that Cowan would not have too much to say to him thereafter. (App. 13-14; J.A. 39-40, 72, 94-95.) The next day, Cowan was discharged (App. 16; J.A. 72).

All five dischargees received identical termination notices. The reasons for unemployment were listed as: "Work was not satisfactory," and "Insubordination" (App. 16; J.A. 25).

The Board, adopting the findings of its Trial Examiner, concluded that the Company had discharged Cowan, Bunker, Bruning, Galloway, and Sumrall be-

cause of their union activity, in violation of Section 8(a)(3) and (1) of the Act (App. 5-6, 16-25). These conclusions relied, *inter alia*, on the circumstances that the Company was admittedly opposed to the Union;[4] it was aware of the dischargees' union activity, since the plant was small and they had openly engaged in such activity there; and the reasons that the Company advanced for the discharges—alleged incompetence and animus towards integration of the work force—did not withstand analysis.[5] The Board ordered the Company to cease and desist from the unfair labor practices found, to reinstate the discriminatees with back pay, and to post appropriate notices (App. 6, 25-27). The court of appeals enforced the Board's order in full (App. 3-4).

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[4] During December 1965, the Company distributed mimeographed letters to its employees, stating that it was "opposed to the union," and that it was its "positive intention" to "prevent it from coming into . . . [the] company" (J.A. 27-29).

[5] Foreman Johann told Bruning, Galloway, and Sumrall that they were discharged because of unsatisfactory work. But Galloway had received a wage increase the week before and none of the three had previously been criticized for poor work (App. 11; J.A. 52, 56, 64). The Examiner refused to credit President Mitchell's testimony that racial prejudice motivated the discharges because, *inter alia*, there was no evidence that these three employees (who were on the day-shift) were anti-Negro; although Mitchell had first hand awareness of Cowan's prejudice and reason to believe that Bunker was also prejudiced, he admitted that he had not decided to fire Bunker until he heard of Bunker's "insubordination" (J.A. 90-91), and Cowan was not terminated until after he had aligned himself with Bunker in that incident; and the Company had not called Foreman Johann as a witness to confirm Mitchell's testimony as to his conversation with Johann (App. 16-19).

ARGUMENT

The petition, in essence, merely presents the question whether five employees were discharged for union activity or for good cause. Such an evidentiary issue does not warrant further review. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the facts summarized in the Statement constitute ample evidentiary support for the Board's findings.[6]

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[6] Contrary to petitioner's contention (Pet. 12), that Foreman Johann was available to both parties does not mean the Examiner erred in drawing an adverse inference from the Company's failure to call him as a witness. See *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226.

Nor is there error (see Pet. 13) in inferring employer knowledge of union activity from the circumstance that the employees openly engaged in union activity in a "small plant." The case cited by petitioner holds exactly to the contrary. See *National Labor Relations Board* v. *Joseph Antell, Inc.*, 358 F. 2d 880, 882-883 (C.A. 1).

And, expressions of anti-union animus, which are not in themselves unlawful, may be used to establish an illegal motivation for other conduct. See *Revere Camera Co.* v. *National Relations Board*, 304 F. 2d 162, 165 (C.A. 7) (see Pet. 14-15).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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